



STATE OF INDIANA

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February 4, 2011

Ms. Michelle Holtkamp
Daily Journal
Via Electronic Mail: mholtkamp@dailyjournal.net

Re: Informal Inquiry 10-INF-60; Franklin Police Department

Dear Ms. Holtkamp:

This is in response to your informal inquiry regarding your records request to the Franklin Police Department ("FPD"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

Your inquiry concerns the FPD's denial of your request for access to public records, which sought access to a police report by the FPD concerning a man's arrest. In response to your request, a records clerk for the FPD replied, "Regarding your request, I found the arrest report at Lover's Lane on 10/13/10. Michael Vincent Massaro was arrested for battery, however the report cannot be released due to its [sic] nature. You will have to contact the Prosecutor's Office for information in the Probable Cause Affidavit." When you contacted the FPD chief of police, he stated that you would have to get the information from the jail and that his department would not release any information because it was confidential under Ind. Code § 31-33 and the investigatory records exception to the APRA, Ind. Code § 5-14-3-4(b)(1).

You argue that Ind. Code § 31-33 is "not relevant in this public records request," and note that the response from the clerk stated that Mr. Massaro was arrested for battery rather than child abuse. Further, you state that "[e]ven if the victim is a child, that part of Indiana law does not pertain to this request." With regard to the citation to the investigatory records exception, you note that the APRA requires law enforcement agencies to release certain information. Specifically, you believe you are entitled to the following information that the FPD has not yet released: the arrested person's age and address; information relating to the circumstances of the arrest, such as the time and location of the arrest and the name of the investigating or arresting officer; the time, date, location, or substance of the complaint received by the FPD concerning this matter; the time, date, and location of the alleged crime; the name and age of any victim, the factual circumstances surrounding the incident, or a description of any injuries, property, or weapons involved; or information about the factual circumstances surrounding the

incident. With regard to the factual circumstances surrounding the incident, the FPD chief informed you that the factual circumstance was “battery,” and later informed you that the department “received an allegation, investigated and made an arrest.”

Both the FPD and the *Daily Journal* contacted the Office of the Public Access Counselor for advice regarding your request. Because I received varying descriptions about the nature of the report at issue and what information the *Daily Journal* believed it was entitled to, I invited the *Daily Journal* to file a written inquiry and encouraged the FPD to submit a written response. FPD Chief of Police Tim O’Sullivan responded on behalf of the FPD. Chief O’Sullivan states that the report requested by the *Daily Journal* is “titled as child abuse, but an outright arrest was made for battery on a Michael Vincent Massaro.” When asked for the suspect’s name, date of birth, and address, Mr. O’Sullivan informed the requester that such information was available from the jail. When the requester sought access to the report from the FPD records clerk, the clerk stated that the report could not be released and referred the request to the prosecutor’s office. Chief O’Sullivan notes that the report “is still under review, so although there was an outright arrest, information released could compromise the case.” Chief O’Sullivan also notes that he contacted the Office of the Public Access Counselor for advice regarding the disclosability of the report. He states that because the matter is still under investigation, the report qualifies as an investigatory record under Ind. Code § 5-14-3-4(b)(1). Also, although the suspect was arrested for battery, the underlying circumstances suggest that the charges filed will ultimately allege child abuse by the suspect. Accordingly, he recommended that the *Daily Journal* contact the prosecutor’s office. Finally, Chief O’Sullivan states that if he is wrong about these matters, he will supply the report immediately.

Ind. Code § 31-33-18-1(a), which specifically controls the investigation of child abuse and neglect, provides in part:

Except as provided in section 1.5 n1 of this chapter, the following are confidential:

- (1) Reports made under this article (or IC 31-6-11 before its repeal).
- (2) Any other information obtained, reports written, or photographs taken concerning the reports taken concerning the reports in possession of:
 - (A) the division of family resources;
 - (B) the county office; or
 - (C) the department.

The Indiana Court of Appeals has held that, “pursuant to Indiana Code Section 31-33-18-1(a), [a child abuse or neglect] investigatory report and any other information obtained during the investigation of a report of child abuse or neglect is confidential.” *In re K.B.*, 894 N.E.2d 1013, 1015 (Ind. Ct. App. 2008). In that case, the Court of Appeals further noted:

The release of an investigatory report is governed by Indiana Code Section 31-33-18-2, which lists the limited persons to whom an investigatory report may be made available. This list does not include media representatives. Given the specific language of this section, it is

clear that the legislature intended to limit the persons who had access to these confidential reports. Accordingly, the investigatory report was confidential and should not have been made available to the public.

Id. According to Ind. Code § 31-33-18-1, “[e]xcept as provided in section 1.5 of this chapter [repealed], the following are confidential: (1) Reports made *under this article* [referring to Article 33] (or IC 31-6-11 before its repeal). . . .” Elsewhere in Article 33, the Indiana Code outlines procedures related to a law enforcement agency’s investigation of reports of child abuse. First, Ind. Code § 31-33-5-4 requires “[a] person who has a duty under this chapter to report that a child may be a victim of child abuse or neglect shall immediately make an oral report to: (1) the [Department of Child Services]; or (2) the local law enforcement agency.” Upon receipt of such a report, the following provisions apply to local law enforcement agencies:

Law enforcement agency investigation and communication of information

Sec. 7. (a) When a law enforcement agency receives an initial report under IC 31-33-5-4 that a child may be a victim of child abuse or neglect, the law enforcement agency shall:

(1) immediately communicate the report to the department, whether or not the law enforcement agency has reason to believe there exists an imminent danger to the child’s health or welfare; and

(2) conduct an immediate, onsite assessment of the report along with the department whenever the law enforcement agency has reason to believe that an offense has been committed.

(b) In all cases, the law enforcement agency shall forward any information, including copies of assessment reports, on incidents of cases in which a child may be a victim of child abuse or neglect, whether or not obtained under this article, to:

(1) the department; and

(2) the juvenile court under IC 31-34-7.

I.C. § 31-33-7-7. The law enforcement agencies mentioned in these provisions are separate and distinct from the Indiana Department of Child Services (“DCS”). *See* I.C. § 31-33-5-4. Because local law enforcement agencies are charged with receiving, investigating, and forwarding investigatory reports to DCS, it appears that the General Assembly intended for investigatory reports created or received by such local law enforcement agencies to be confidential just as they would be if created by DCS itself. *Id.* Consequently, it is my opinion that if the report created by the FPD was created in conjunction with the FPD’s investigation of a report of child abuse, and that report was later forwarded to DCS in accordance with the above provisions, the report is confidential under Ind. Code § 31-33-18-1(a).

However, regardless of whether or not the report itself is confidential, the APRA, (specifically Indiana Code sections 5-14-3-5(a) and (c)) sets forth the information about arrests and suspected crimes, accidents or complaints that *must* be provided upon request:

If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including his name, age, and address.
- (2) Information concerning any charges on which the arrest or summons is based.
- (3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:
 - (A) time and location of the arrest or the issuance of the summons;
 - (B) investigating or arresting officer (other than an undercover officer or agent); and
 - (C) investigating or arresting law enforcement agency.

I.C. § 5-14-3-5(a). The APRA also requires law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The record containing this information must be created not later than twenty-four hours after the incident has been reported to the agency, and the information must be made available for inspection and copying. The following information must be maintained in the daily log:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;
 - (B) the name and age of any victim,¹ unless the victim is a victim of a crime under IC 35-42-4;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved.

I.C. § 5-14-3-5(c). In accordance with these provisions, I agree with the *Daily Journal* that the FPD should release the arrested individual's age and address; information relating to the circumstances of the arrest, such as the time and location of the arrest and the name of the investigating or arresting officer; the time, date, location, or substance² of the complaint received by the FPD concerning this matter; the time, date, and location of the alleged crime; the name and age of any victim, the factual circumstances surrounding the incident, a description of any injuries, property, or weapons involved; and information about the factual circumstances surrounding the incident.

That said, there remains a question of how much information must be released for the FPD to satisfy the APRA's requirement that it disclose the factual circumstances surrounding the incidents pursuant to Ind. Code § 5-14-3-5(c)(3). Unfortunately, the nature of what kind of information constitutes the "factual circumstances surrounding the

¹ If the victim in this incident were a victim of a crime under Ind. Code § 35-42-4 (sex crimes such as rape, child molesting, etc.) the FPD would act appropriately by not releasing the name. *See also* I.C. § 5-14-3-5(c)(3)(B). Because nothing indicates that the victim here was a victim of a sex crime, the provision does not appear to prohibit the FPD from releasing the victim's name.

² Again, however, the FPD need not release the actual report because it is confidential under Ind. Code § 31-33-18-1(a).

incident” is unclear because the APRA does not define the term. *See generally* I.C. § 5-14-3-2. A 2004 informal opinion from Counselor Davis provides some guidance:

As you characterize it, the [daily] log is deficient because it often has only one-word responses to the elements included in IC 5-14-3-5(c)(3)(C) and (D). You state that for example, the log may simply say “burglary” where you believe the law would require a fuller explanation of the factual circumstances and a description of the injuries, property, or weapons involved. Further, you suggest that this part of the log should approximate what an investigating officer would tell his chief or a prosecutor in summarizing an incident.

IC 5-14-3-5 does not contain any specific standard regarding how extensive the “factual circumstances” and “general description” must be. However, **I agree that a one word description such as “burglary” for the factual circumstances surrounding the alleged crime or infraction is not sufficient. Rather, a reasonable interpretation of the requirement to create and disclose a log would contemplate that the description in (C) and (D) would serve to inform a person of the circumstances that led to the police being summoned to investigate, a brief summary of what they found at the scene, and a further indication of the items in (D). To illustrate, the log entry currently showing “burglary” might be illuminated in the following way: “police were summoned on report of sounds of breaking glass; when officer arrived, he saw signs of forcible entry in residence; numerous items inside the house missing and homeowner injured in altercation with suspect.”**

Obviously, it would be difficult to set out a specific standard with respect to the completeness of the log. However, **I doubt that your suggested standard is the one required by the statute, where an officer’s statement of the crime or infraction reported to a prosecutor or chief might include his or her impressions of who a likely suspect is or the incident’s similarity to other incidents, as examples. Those impressions may well be part of the investigatory record that could be withheld under the exception for investigatory records at IC 5-14-3-4(b)(1).**

Informal Inquiry Re: Law Enforcement Records and the Access to Public Records Act at 2 (November 23, 2004), available at http://www.in.gov/pac/informal/files/Hoosier_State_Press_Association_memo.pdf. As Counselor Davis acknowledged in her opinion, it is difficult to define the contours of the “factual circumstances” standard, but I agree with her explanation of its boundaries. On the one hand, a one-word description is probably not sufficient to satisfy the statutory requirement that the “factual circumstances” be released. On the other hand, however, a law enforcement agency need not release information that would “approximate what an investigating officer would tell his chief or a prosecutor in summarizing an incident” because details such as “the officer’s . . . impressions of who a likely suspect is or the incident’s similarity to other incidents . . . may well be part of the investigatory record that could be withheld under the exception for investigatory records at IC 5-14-3-4(b)(1).” In accordance with these principles, it is my opinion that FPD should supplement its statement that an arrest for

battery occurred with details that more fully explain the factual circumstances surrounding the incident.

The *Daily Journal* also questions whether it was appropriate for the FPD to refer its request for information to the jail and the prosecutor. If a public agency receives a request for records, the agency should release all records that the agency maintains that are responsive to that request, unless the agency can cite to a provision in the APRA that permits or requires the agency to withhold the records. Section 5 of the APRA pertains to certain “information” in the possession of law enforcement agencies that must be released, which is different than most APRA requests that require merely the release of actual records rather than information. Thus, pursuant to section 5 and the general requirements of APRA, the FPD should release any and all information that the FPD has that is required to be released under section 5. If, however, the FPD does not have information mentioned by section 5 -- such as “[i]nformation concerning any charges on which the arrest or summons is based,” I.C. § 5-14-3-5(a)(2), which might be maintained by a prosecutor rather than a police department -- the FPD does not violate the APRA by referring the request to a separate agency that does have the information.

To summarize, it is my opinion that the report maintained by the FPD is a confidential record under Ind. Code § 31-33-18-1(a) if it is a report of child abuse or neglect. However, the FPD should release the information specified in subsections 5(a) and 5(c) of the APRA in accordance with the principles outlined above. Once the FPD releases all non-confidential information that it has, the FPD does not violate the APRA by referring the *Daily Journal* to another agency that maintains the remaining information specified in subsections 5(a) and 5(c).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Tim O' Sullivan